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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
ROBERT T. MATSUI FEDERAL COURTHOUSE

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,

Plaintiff,

v.

KATHLEEN ALLISON, in her official
capacity as Secretary of the California
Department of Corrections and Rehabilitation,

Defendants.

COUNTY OF AMADOR, a public agency of
the State of California,

Plaintiff,

v.

KATHLEEN ALLISON in her official capacity
as Secretary of the California Department of
Corrections and Rehabilitation; PATRICK
COVELLO in his official capacity of Warden
of California Department of Corrections and
Rehabilitation Mule Creek State Prison; and
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendants.

Case No. 2:20-cv-02482-WBS-AC
[Consolidated with 2:21-cv-00038-WBS-
AC]

**JOINT TRIAL BRIEF OF PLAINTIFFS
COUNTY OF AMADOR AND
CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE**

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1 In accordance with Local Rule 285, Plaintiffs the County of Amador (County) and the
 2 California Sportfishing Protection Alliance (CSPA) (collectively, Plaintiffs) respectfully submit
 3 this Joint Trial Brief in support of their claims against Defendants Jeffrey Macomber¹, in his
 4 official capacity as Secretary of the California Department of Corrections and Rehabilitation, and
 5 Patrick Covello, in his official capacity as Warden of the California Department of Corrections
 6 and Rehabilitation Mule Creek State Prison, (collectively, CDCR).

7 **I. INTRODUCTION**

8 CDCR regularly discharges polluted water from the municipal separate storm sewer
 9 system (MS4) at Mule Creek State Prison (Prison) to Mule Creek, a water of the United States
 10 and a tributary to the Sacramento-San Joaquin Delta, one of the most important water bodies in
 11 the United States and a source of drinking water for millions of Californians. CDCR's self-
 12 monitoring reports demonstrate that the Prison's MS4 discharges consistently and significantly
 13 exceed water quality standards for bacteria and metals such as aluminum, iron, manganese,
 14 copper, lead, and zinc. Thus, CDCR's own sampling conclusively establishes that CDCR has in
 15 the past, and is currently violating the Federal Water Pollution Control Act, commonly known as
 16 the Clean Water Act (Act), 33 U.S.C. § 1251 *et seq.* Moreover, state and federal inspectors have
 17 determined, and Plaintiffs' sampling confirms, that untreated sewage is discharging from the
 18 MS4, further establishing violations of the Act. To stop CDCR's ongoing pollution of Mule
 19 Creek, the County and CSPA jointly ask this court to issue injunctive relief under the Act to
 20 compel CDCR to implement an existing (but inexplicably unimplemented) plan to correct the
 21 grave infrastructure deficiencies at the Prison that would help stop this ongoing pollution and put
 22 CDCR on a path to achieve compliance with the Act.

23 **II. STATEMENT OF FACTS**

24 Citizen suit trials under the Act can often be complicated and highly technical. However,
 25 the key facts about CDCR's ongoing pollution of Mule Creek are simple and straightforward.
 26 CDCR has consistently self-reported that its MS4 discharges exceed applicable water quality

27 ¹ On February 10, 2023, CDCR filed notice that Jeffrey Macomber had replaced Kathleen Allison
 28 as Secretary of the California Department of Corrections and Rehabilitation, and that Mr.
 Macomber should be substituted as a party pursuant to Fed. R. Civ. P. 25.

standards, and that those are contributing to exceedances of pollutants in Mule Creek. Moreover, the evidence shows that untreated sewage and irrigation water is entering the MS4 due to defects in the Prison's infrastructure that CDCR has wholly failed to address. This portion of the Joint Trial Brief introduces some of the key witnesses that will help the Court make its decision, and then describes the key facts about the Prison, its discharges of polluted water to Mule Creek, and its failing sewer and storm water infrastructure.

A. Introduction of Expert Witnesses

This trial will primarily consist of expert testimony regarding the quality of the Prison's MS4 discharges to Mule Creek and whether the quality of that water, as well as the actions taken by CDCR in response to these discharges, meet the requirements of the Act. There will also be some percipient testimony from employees of the Central Valley Regional Water Quality Control Board (Regional Board) and CDCR. Some of the key witnesses are briefly introduced below.

Plaintiffs will prove their case primarily through CDCR's own self-monitoring reports and the expert testimony of Karen Ashby and Doctor Robert Emerick. Karen Ashby is Vice President at Larry Walker Associates, Inc., one of the preeminent environmental engineering and consulting firms specializing in water quality management. Ms. Ashby has over 30 years of experience in municipal storm water matters, including storm water program management, municipal storm water permit compliance, water quality standards and beneficial uses, evaluating monitoring reports and reporting on storm water program effectiveness. Ms. Ashby has "hands-on" experience with municipal storm water programs because she managed the area-wide municipal storm water program for the County of Orange for over ten years. She holds a Bachelor of Science from the University of California at Irvine, has been certified as a Professional in Storm Water Quality by Envirocert International, Inc., since 2004 and is an active member of the most significant storm water association in California: the California Stormwater Quality Association (CASQA). Ms. Ashby has served as a member of the CASQA Board of Directors and received the CASQA Leadership Award in 2018 in recognition of her significant contributions to the storm water profession.

Ms. Ashby will testify regarding the water quality standards that apply to Mule Creek,

1 how CDCR's monitoring reports conclusively establish hundreds of violations of those standards,
2 and how CDCR's program regularly results in the discharge of highly-polluted water to Mule
3 Creek. Ms. Ashby will testify that CDCR has violated the Act more than 350 times since
4 February 2019.

5 Plaintiffs will also present expert testimony from Dr. Robert Emerick. Dr. Emerick holds
6 a Ph.D. in Civil and Environmental Engineering from the University of California, Davis (1998),
7 with doctoral minors in stochastic modeling and ecology. Dr. Emerick's doctoral dissertation
8 focused on determining wastewater treatment process type impacts on coliform bacteria within
9 wastewater particles. Dr. Emerick is a registered Professional Engineer with the State of
10 California. He has over 30 years of experience in Clean Water Act permitting, including
11 wastewater and storm water permitting, as well as design and operations of water, wastewater,
12 and recycled water infrastructure. Dr. Emerick's storm water experience includes significant work
13 for the California Department of Transportation and the County of Sacramento, developing
14 feasible best management practices to reduce pollutants sufficient to comply with regulatory
15 standards. Dr. Emerick has also conducted research with regard to the presence and treatment of
16 pharmaceuticals and personal care products in wastewater.

17 Dr. Emerick will testify regarding the relationship between the sewer system and the
18 storm water system at the Prison. He will express the opinions that CDCR's discharges to Mule
19 Creek contain a sewage component, that these discharges contaminated with sewage occur during
20 both rain events and during dry weather periods, and that the most likely source of that sewage is
21 CDCR's sanitary sewer system.

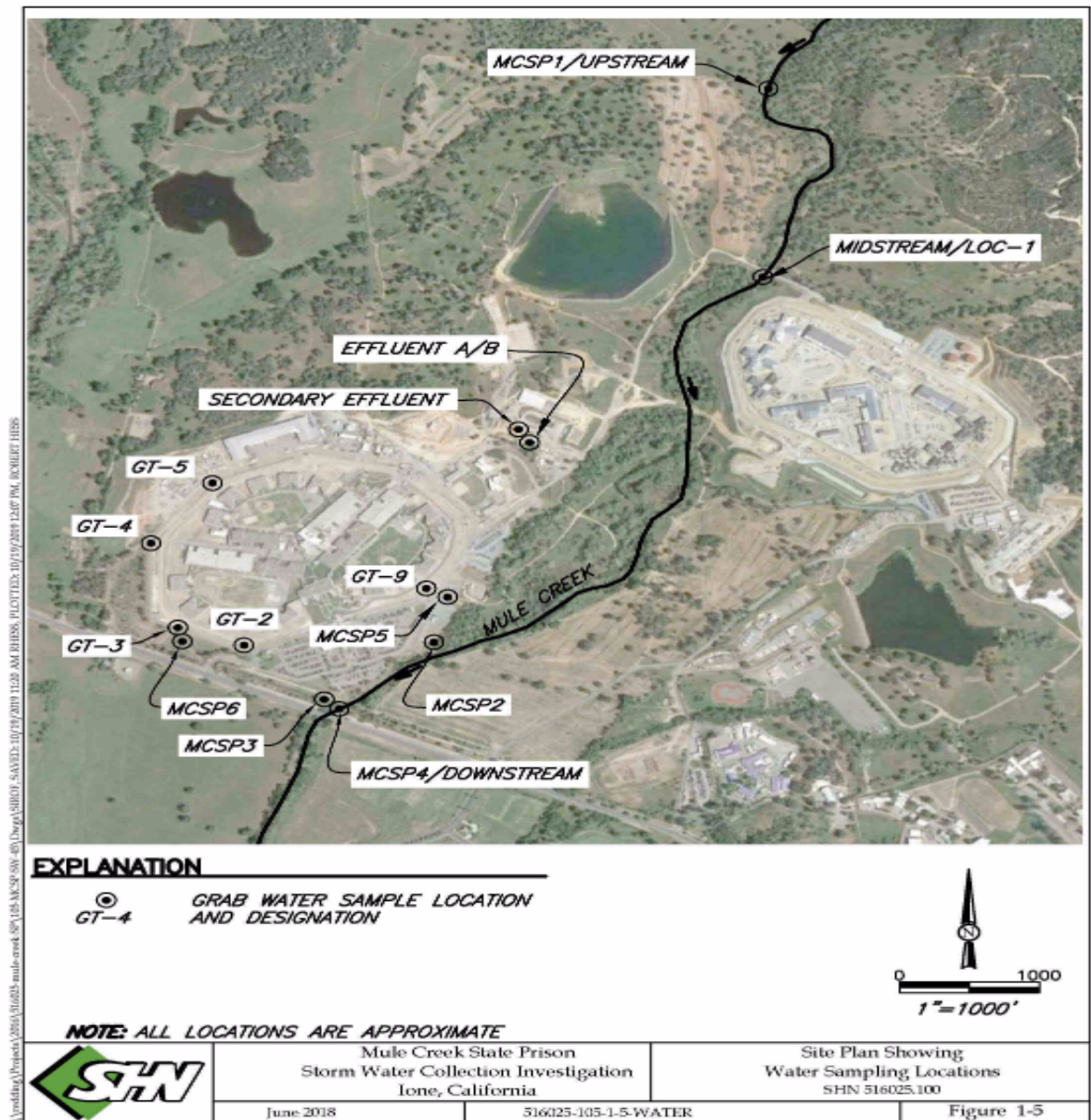
22 CDCR has designated Timothy S. Simpson as its expert. Plaintiffs acknowledge Mr.
23 Simpson's qualifications in the area of industrial storm water, although industrial storm water is
24 no longer an issue in this trial. In fact, Mr. Simpson was the testifying expert in many important
25 published industrial storm water decisions that Plaintiffs contend support their claims in this
26 matter, including, but not limited to, the companion cases of *Santa Monica Baykeeper v. Kramer*
27 *Metals, Inc.*, 619 F.Supp.2d 914 (C.D. Cal. 2009) and *Santa Monica Baykeeper v. International*
28 *Metals Ekco, Limited*, 619 F.Supp.2d 936 (C.D. Cal. 2009). As the Court considers Mr.

1 Simpson's testimony, it should be mindful that 90% of Mr. Simpson's work is on the industrial
2 storm water issues that are no longer part of this lawsuit. As Mr. Simpson admitted in his
3 deposition, he does not find the municipal storm water issues—the issues that are at the core of
4 this trial--“particularly interesting or challenging.” In Mr. Simpson's own words, they are “not
5 something that I spend a lot of time on.” At the time of his deposition, Mr. Simpson could not
6 identify a single prior project involving the municipal permit at issue in this case on which he had
7 previously worked.

8 **B. The Prison's MS4 and Sanitary Sewer System**

9 CDCR owns and operates the Prison, an approximately 866-acre complex in Ione,
10 California, housing approximately 4,300 inmates. Trial Ex. 51 (Stormwater Collection System
11 Investigation Report of Findings) at p. 6, § 1.3. The Prison contains two major pieces of old and
12 degraded infrastructure that individually and collectively result in regular and ongoing discharges
13 of polluted water to Mule Creek—the Prison's MS4 and the Prison's sanitary sewer system.

14 CDCR owns and operates a system of conveyances, including channels, drains, culverts,
15 ditches, swales, and outfalls that it uses to collect both storm water and dry-weather flows and
16 then to discharge that water, and all the pollutants in it, to Mule Creek. *Id.* at pp. 7-9, § 1.4. Under
17 the Act and its implementing regulations, such a system is referred to as a municipal separate
18 storm sewer system or “MS4.” 40 C.F.R § 122.26(b)(8). The aerial photograph below shows the
19 Prison, the Prison's MS4, and its relationship to Mule Creek:
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MCSP0004089

As the depiction above illustrates, CDCR's MS4 employs a perimeter drain system to collect water from the Prison and discharge it at two different locations to Mule Creek. Any runoff (dry weather or wet weather) from the Prison's "A" Yard, "B" Yard, and Center Corridor collects in underground pipelines and is conveyed to a perimeter ditch, that flows generally from the guard tower marked as "GT-6" in the photograph toward the low point near the guard tower marked as "GT-3." Runoff from inside the Prison joins with the perimeter ditch at a location near

the guard tower marked as GT-4. The flows within the perimeter ditch from GT-6 to GT-3 collect in drop inlets, flow through a culvert under a perimeter road, and enter an earthen channel at the location indicated as “MCSP6” that discharges to Mule Creek via the location indicated as “MCSP3” (sometimes called the “Main Outfall”). Trial Ex. 51 (Stormwater Collection System Investigation Report of Findings) at pp. 7-9, § 1.4.1.

The remainder of the runoff from the Prison collects in a perimeter ditch on the opposite side of GT-5, then flows through a culvert under a perimeter road, and into an earthen channel at the location indicated as “MCSP5” that discharges to Mule Creek at the location indicated as “MCSP2” (sometimes called the “Secondary Outfall”). Trial Ex. 51 (Stormwater Collection System Investigation Report of Findings) at p. 9, § 1.4.2.

CDCR also owns and operates a sanitary sewer system and wastewater treatment plant (WWTP) at the Prison to transport and treat wastewater at the Prison. Trial Ex. 8 (Order R5-2015-0129) at p. 1, finding 1; Trial Ex. 57 (Sewer System Management Plan) at p. 3, § I. The WWTP receives flows of domestic and industrial wastewater created at the Prison. *Id.* Approximately 5.75 miles of sanitary sewer pipes transport wastewater through the Prison to the WWTP. Trial Ex. 57 (Sewer System Management Plan) at MCSP0029661.

For the most part, the MS4 and sanitary sewer system are separate systems. However, CDCR diverts some non-stormwater flows in the MS4 during dry weather to the WWTP, using slide gates at locations “MCSP5” and “MCSP6.” During rain events, CDCR opens the slide gates in the MS4 and releases any water in the MS4, including any wastewater or non-stormwater in the MS4 directly to Mule Creek. Trial Ex. 47 (Interim Disposal Plan) at p. 4, ¶ 3.0; see generally, Trial Exs. 454-488 (discharge notifications).

C. The Prison’s History of Violations Leading to Coverage Under the Small MS4 Permit and Issuance of the 13383 Orders

CDCR has a long history of violating the Act or comparable state water quality laws at the Prison. For example, in December of 2006, the Regional Board issued a Cease and Desist Order to CDCR related to the operations of the WWTP. Trial Ex. 8 (Order R5-2015-0129) at p. 6, finding 21. Similarly, in March of 2007, the Regional Board issued Administrative Civil Liability

1 Complaint R5-2007-0505 because CDCR had “discharged waste to surface waters and outside of
2 the designated disposal area with a total flow of 54,750 gallons during July 2006 and January
3 2007.” *Id.* at p. 7, finding 22.

4 CDCR’s history of repeated and ongoing water quality violations is most recently
5 illustrated by events starting in or about late December of 2017. At that time, the Regional Board
6 commenced an investigation of a complaint made by David Anderson that CDCR was
7 discharging water illegally to Mule Creek from the Prison. Trial Ex. 27 (ACL 2021 Order R5-
8 2021-0001) at pp. 2-4, findings 5-15. Mr. Anderson will testify that he witnessed water being
9 discharged “as varying between clear and jet black, sometimes with solids, and sometimes
10 steaming hot.” *Id.*, at p. 2, finding 6.

11 The Regional Board inspected the Prison and observed water flowing through the MS4,
12 which discharges to Mule Creek; sampled the flowing water; and confirmed based on its own
13 samples and sampling conducted by CDCR that the results “show concentrations of waste-type
14 constituents at levels that would be expected in wastewater, sewage, and/or grey water” including
15 bacteria and metals, among other pollutants. *Id.*, at pp. 3, 5, findings 9, 17, tbl. 1. The Regional
16 Board also confirmed that CDCR had not properly obtained coverage under applicable permits
17 for these discharges. *Id.*, at p. 3, findings 11-12. Based on its investigation, the Regional Board
18 issued a California Water Code section 13267 Order requiring CDCR to take certain actions to
19 address the discharges to Mule Creek, including, but not limited to monitoring the discharges and
20 conducting certain studies. *Id.*, at p. 4, finding 13; see also Trial Ex. 11 (13267 Order).

21 In April 2019, the Regional Board took action to force CDCR to enroll and obtain
22 coverage under State Water Resources Control Board Order 2013-0001-DWQ, the Small
23 Municipal Separate Storm Sewer System Permit (Small MS4 Permit”). Trial Ex. 6 (WQ2019-
24 0009-EXEC). Coverage under the Small MS4 Permit was required because CDCR was
25 discharging water from its MS4 to Mule Creek, a water of the United States. *Id.* Such discharges
26 are illegal under the Act unless done in compliance with a permit issued pursuant to the Act, a
27 permit which CDCR admittedly did not possess. 33 U.S.C. § 1311(a); Trial Ex. 27 (ACL 2021
28 Order R5-2021-0001) at pp. 3, 6, findings 11-12, 18-19.

1 The Small MS4 Permit contains the following four provisions at issue in this case:

- 2 • Provision B.2 (Discharge Prohibition)—Discharges of storm water from the MS4
3 to waters of the U.S. in a manner causing or threatening to cause a condition of
4 nuisance as defined in Water Code § 13050 are prohibited.
- 5 • Provision B.3 (Discharge Prohibition)—Discharges through the MS4 of material
6 other than storm water to waters of the U.S. shall be effectively prohibited, except
7 as allowed under this Provision or as otherwise authorized by a separate NPDES
8 permit.
- 9 • Provision C.1 (Effluent Limitation)—Permittees shall implement controls as
10 required by this Order to reduce the discharge of pollutants from their MS4 to
11 waters of the U.S. to the MEP.
- 12 • Provision D (Receiving Water Limitation)—Discharges shall not cause or
13 contribute to an exceedance of water quality standards contained in a Statewide
14 Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable
15 Regional Water Board Basin Plan.

16 In addition, under Provision G of the Small MS4 Permit, CDCR must “modify and
17 implement [its] storm water management programs *and monitoring* as required by the Regional
18 Water Board Executive Officer.” Trial Ex. 2. The Regional Board Executive Offer used this
19 authority to add specific monitoring and reporting requirements to the Small MS4 Permit through
20 the adoption of three orders under California Water Code section 13383 (“13383 Orders”). *See*
21 Trial Ex. 20 (13383 Order, dated Aug. 6, 2020) at pp. 1-2, findings 4, 7; Trial Ex. 24 (13383
22 Order, dated Dec. 22, 2020) at p. 2, findings 4, 7; Trial Ex. 31 (13383 Order, dated Nov. 29,
23 2021) at pp. 2-3, findings 4, 8. The monitoring and reporting requirements added to the Small
24 MS4 Permit by these 13383 Orders are intended to “ensure compliance” with the Small MS4
25 Permit. *Id.* The provisions added to the Small MS4 Permit by these 13383 Orders provide that the
26 monitoring points required “shall be representative of the volume and nature of the monitored
27 discharge.” Trial Ex. 20 (13383 Order, dated Aug. 6, 2020) at p. 4, § II.A; Trial Ex. 24 (13383
28 Order, dated Dec. 22, 2020) at p. 5, § II.A; Trial Ex. 31 (13383 Order, dated Nov. 29, 2021) at p.

1 4, § II.A.

2 **D. CDCR's Sampling Requirements**

3 Under the 13383 Orders, CDCR is required by the Regional Board to maintain several
 4 representative sampling points to monitor its discharges to Mule Creek and to assess its
 5 compliance with the Small MS4 Permit and the Act. Trial Ex. 11 (13267 Order) at p. 7, § C-D;
 6 Trial Ex. 20 (13383 Order, dated Aug. 6, 2020) at pp. 4-10, §§ II-VI; Trial Ex. 24 (13383 Order,
 7 dated Dec. 22, 2020) at pp. 5-8, §§ II-VI; Trial Ex. 31 (13383 Order, dated Nov. 29, 2021) at pp.
 8 4-10, §§ II – VI. These sampling points include locations designed to represent the quality of the
 9 water discharging from the Prison's MS4 to Mule Creek and the quality of the water in Mule
 10 Creek near and below the points of discharge. Each of these representative monitoring points
 11 assess compliance with the Act. *Id.*

12 The Regional Board requires CDCR to use one of two representative sampling locations,
 13 depicted as one of MCSP3 or MCSP6 and one of MCSP2 or MCSP5 in the diagram above, to
 14 assess the quality of the discharges from the Main Outfall. Trial Ex. 20 (13383 Order, dated Aug.
 15 6, 2020) at pp. 4-7, §§ II-V; Trial Ex. 24 (13383 Order, dated Dec. 22, 2020) at pp. 5-9, §§II-V;
 16 Trial Ex. 31 (13383 Order, dated Nov. 29, 2021) at pp. 4-9, §§ II-V. The Regional Board makes
 17 clear that samples taken at any of these sampling points are “representative of the volume and
 18 nature of the monitored discharge” from the Prison's MS4. Trial Ex. 20 (13383 Order, dated Aug.
 19 6, 2020) at p. 4, § II.A; Trial Ex. 24 (13383 Order, dated Dec. 22, 2020) at p. 5, § II.A; Trial Ex.
 20 31 (13383 Order, dated Nov. 29, 2021) at p. 4, § II.A. Thus, as explained above *infra* § III.D,
 21 sampling at those point is sufficient to determine compliance with the Small MS4 Permit.

22 Moreover, as a factual matter, sampling at MCSP2, MCSP3, MCSP5, and MCSP6
 23 accurately reflects the quality of the Prison's MS4 discharges. First, CDCR admits that MCSP2
 24 and MCSP3 are located at the point where the MS4 discharges to Mule Creek. ECF No. 95-2, ¶
 25 24. Second, the evidence demonstrates that samples taken at MCSP5 and MCSP6 accurately
 26 reflect discharges to Mule Creek. CDCR takes samples at MCSP5 and MCSP6 when the slides
 27 gates are open, allowing releases to Mule Creek. See e.g., Trial Exs. 454-488 (Discharge
 28 Notifications). There is no evidence that the ditches between MCSP5/6 and MCSP2/3,

1 respectively reduce pollutants during those conditions. Ashby Testimony; see also Trial Ex. 51
 2 (Stormwater Collection System Investigation Report of Findings) at Tbls. 3.5-9 and 3.5-10
 3 (showing average *E. coli*, aluminum, and iron results at MCSP6 were higher than average result
 4 at MCSP3). Moreover, CDCR's designated representative has testified (and will presumably
 5 testify at trial) that he did not know whether the ditches were even intended to reduce pollutants.

6 The Regional Board also requires CDCR to monitor the quality of the water in Mule
 7 Creek upstream of and just downstream of the MS4 outfalls to Mule Creek. CDCR therefore
 8 monitors the water quality in Mule Creek at the location marked as "MCSP4" on the figure
 9 above, located in Mule Creek, downstream from the Prison. Trial Ex. 20 (13383 Order, dated
 10 Aug. 6, 2020) at p. 5, tbl. A; Trial Ex. 24 (13383 Order, dated Dec. 22, 2020) at p. 7, tbl. A; Trial
 11 Ex. 31 (13383 Order, dated Nov. 29, 2021) at pp. 5-6, tbl. A.

12 E. CDCR'S Monitoring Reports

13 CDCR's Small MS4 Permit, as modified by the 13383 Orders, require CDCR to conduct
 14 monitoring and report the results of that monitoring under penalty of perjury. Trial Ex. 20 (13383
 15 Order, dated Aug. 6, 2020) at p. 3, § I.E; Trial Ex. 24 (13383 Order, dated Dec. 22, 2020) at p. 5,
 16 § I.F; Trial Ex. 31 (13383 Order, dated Nov. 29, 2021) at p. 4, § I.D. Between April 24, 2019 and
 17 February 6, 2023, the Prison discharged to Mule Creek on 156 days.² Prior to December 20, 2020,
 18 and beginning in February 2023, CDCR monitored its discharges at MCSP2 and MCSP3. These
 19 monitoring reports conclusively establish, between February 24, 2019 and December 19, 2021,
 20 the following occurred:

- 21 1. **Forty-two (42) times**, the Prison's MS4 discharges to Mule Creek, as measured at
 22 MCSP2 and MCS3, contained levels of *E. coli* exceeding applicable water quality
 23 standard (WQS).³ Ashby Expert Testimony; see also Trial Ex. 408, pp. 204-206,
 24

25 ² These days are as follows: In 2019: April 1-6, 8, 16, May 15 - 22, September 16, 18, November
 26 26-30, December 1-9, 11, 22, 23. In 2020: January 8-12, 15-17, 24-27, March 6- 8, 13-19, 25, 26,
 27 April 4-7, 20, May 17-20, 28, December 11 - 14, 16, 17, 25 - 27. In 2021: January 4, 5, 23-31,
 28 February 1-3, 11-16, March 5-6, 9-11, 14-16, 18-19, October 20-27, November 8-10, December
 9-31. In 2022: March 15-21, 27-29, April 11, November 2, December 1. In 2023: February 6. See
 Trial Exhs. 408-415, 421, 426, 431, 460-461, 464, 466-467, 469, 471, 480, 499-500.

³ These discharges occurred on the following days: In 2019, April 8, May 16, May 20, September
 16, December 11, December 23. In 2020, January 9, January 16, January 17, January 27, March
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COA0005833-5835; Trial Ex. 409 pp. 185, 197, 209, COA0006116, 6128, 6140; Trial Ex. 411 p. 203, COA7478; Trial Ex. 412 pp. 136, 253, 259, 265, COA0007750, 7867, 7873, 7879; Trial Ex. 413 pp. 144, 156, 213, 219, 237, 296, 302, COA0008195, 8207, 8264, 8270, 8288, 8345-8347; Trial Ex. 414 pp. 150, 156, 162, 175, 235, COA0008524, 8530, 8536, 8549, 8609; Trial Ex. 415 pp. 175, 217, 223, 231, 237, COA0008822, 8864, 8816-8821, 8870, 8878, 8884; Trial Ex. 67 pp. 1-8, MCSP0058689-58696

2. **Nineteen (19) times**, the MS4 discharges to Mule Creek, as measured at MCSP2 and MCSP3, contained *E. coli* at levels exceeding applicable WQS when Mule Creek also exceeded the *E. coli* WQS, as measured at MCSP4.⁴ *Id.*

3. **Nineteen (19) times**, the MS4 discharges to Mule Creek, as measured at MCSP2 and MCSP3, contained levels of aluminum, iron, lead, and/or zinc exceeding applicable WQS.⁵ Ashby Expert Testimony; see also Trial Ex. 409 pp. 201-208, COA0006132-6139; Trial Ex. 412 pp. 128-135, COA0007742-7749; Trial Ex. 413 pp. 148-156, COA0008199-8207; Trial Ex. 415 pp. 167-175, COA0008816-8821; Trial Ex. 418 pp. 127-134, MCSP0032893-32900; Trial Ex. 67 pp. 1-8, MCSP0058689-58696.

4. **Ten (10) times**, MS4 discharges to Mule Creek, as measured at MSCP2 and MCSP3, contained levels of aluminum, iron, lead, and/or zinc above WQS when Mule Creek, as measured at MSCP4, also exceeded WQS for those metals.⁶ *Id.*

After December 20, 2021, CDCR sampled the Prison's MS4 discharges at MCSP5 and MCSP6. These self-monitoring reports continue to show similar exceedances of WQS, as

16, March 17, March 25, March 26, April 6, April 7, April 20, May 18, May 19, May 28. In 2023, Feb. 6.

⁴ These occurred on the following days: In 2019, May 16, May 20, September 16, December 11, December 23. In 2020, January 9, January 16, January 17, January 27, March 16, March 17, March 25, March 26, April 6, April 7, April 20, May 18, May 19, May 28.

⁵ These occurred on the following days: In 2019, May 16 (aluminum, iron, zinc), September 16 (aluminum, iron, zinc). In 2020, January 9 (aluminum, iron, zinc), March 16 (aluminum, iron), May 18 (aluminum, iron, zinc). In 2023, February 2.

⁶ These occurred on the following days: In 2019, May 16 (iron), September 16 (aluminum, iron, zinc). In 2020, January 9 (aluminum, iron), March 16 (aluminum, iron), May 18 (aluminum, iron).

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1 follows:

- 2 1. **Ten (10) times**, the Prison's MS4 discharges to Mule Creek, as measured at
3 MCSP5 and MCS6, contained levels of *E. coli* exceeding applicable WQS.⁷ Ashby
4 Expert Testimony; see also Trial Ex. 425 pp. 21-26, COA0031343-31348, pp. 39-
5 45, COA31361-31367, pp. 56-62, COA31378-31384; Trial Ex. 426 pp. 25-32,
6 COA68040-68047; pp. 43-50, COA68058-68065; Trial Ex. 427 pp. 30-37,
7 COA0032294-32301.
- 8 2. **Six (6) times**, the MS4 discharges to Mule Creek, as measured at MCSP5 and
9 MCSP6, contained *E. coli* at levels exceeding applicable WQS when Mule Creek
10 also exceeded the *E. coli* WQS, as measured at MCSP4.⁸ *Id.*
- 11 3. **Ninety-one (91) times**, the MS4 discharges to Mule Creek, as measured at
12 MCSP5 and MCSP6, contained levels of aluminum, iron, lead, and/or zinc
13 exceeding applicable WQS.⁹ *Id.*; see also Trial Ex. 421 pp. 15-27, MCSP0001915-
14 1927; pp. 33-38, MCSP0001933-1938, pp. 60-65, MCSP001960-1965, pp. 76-81,
15 MCSP0001976-1981, pp. 105-110, MCSP0002005-2010;
- 16 4. **Thirty-seven (37) times**, the MS4 discharges to Mule Creek, as measured at
17 MSCP5 and MCSP6, contained levels of aluminum, iron, lead, and/or zinc above
18 WQS when Mule Creek, as measured at MSCP4, also exceeded WQS for those
19 metals.¹⁰ *Id.*

20 ⁷ These occurred on the following days: In 2021, October 22, November 9, December 9. In 2022,
21 March 15, March 28, April 11.

22 ⁸ These occurred on the following days: In 2021, October 22, November 9, December 9. In 2022:
23 March 15, March 28, April 11.

24 ⁹ These occurred on the following days: In 2020, December 17 (aluminum, iron, lead, zinc). In
25 2021, January 27 (aluminum, iron, manganese, copper, lead, zinc), February 2 (aluminum, iron,
26 manganese, zinc), March 10 (aluminum, iron, zinc), March 15 (aluminum, iron, manganese,
27 zinc), March 19 (aluminum, iron, copper, lead, zinc), October 22 (aluminum, iron, manganese,
28 copper, zinc), November 9 (aluminum, iron, manganese, zinc), December 9 (aluminum, iron,
manganese, zinc). In 2022, March 15 (aluminum, iron, manganese, zinc), March 28 (aluminum,
iron, manganese, zinc), April 11 (aluminum, iron, manganese, zinc). In 2023, February 2.

¹⁰ These occurred on the following days: In 2020, December 17 (aluminum, iron, lead, zinc). In
2021, January 27 (aluminum, iron, zinc), February 2 (aluminum, lead, zinc), February 12
(aluminum, lead), March 10 (aluminum, zinc), March 15 (aluminum, iron, zinc), March 19, (iron,
lead), October 22 (aluminum, iron, manganese, copper, zinc), November 9 (aluminum, iron,
manganese), December 9, 2021 (aluminum, iron, manganese). In 2022, March 15 (aluminum,
iron), March 28 (aluminum, iron), April 11 (aluminum, iron, manganese, zinc).

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1 Reflected in the numbers above, CDCR self-reported exceedances of *E. coli* at MCSP3
 2 and exceedances of metals at both MCSP2 and MCSP3 as recently as February 6, 2023. Trial Ex.
 3 67 (Feb. 6 lab results).

4 In other words, CDCR's self-monitoring reports show exceedances of water quality
 5 standards at MCSP2, MCSP3, MCSP4, MCSP5, and MCSP6, which, as set forth in more detail
 6 below, admit and conclusively establish at least 221 separate violations of the Small MS4 Permit
 7 (and therefore the Act) since February of 2019.

8 **F. Cross-Contamination of the Sanitary Sewer System and the MS4**

9 In addition to reporting consistent exceedances of WQS in their MS4 discharges and in
 10 Mule Creek, CDCR has identified hundreds of defects in both its sanitary sewer system and the
 11 MS4. See, e.g., Trial Ex. 51 (Stormwater Collection System Investigation Report of Findings) at
 12 pp. 78-82, §§ 4.1 – 4.2.2. These defects include broken/collapsed pipes, fully separated joints,
 13 deformations, compromised seals, failed previous repairs, and large holes, cracks, or breaks
 14 where soil is visible. *Id.* at pp. 40-42, §§ 3.4.2.3(i), (ii). The sanitary sewer system and the MS4
 15 were also constructed in close proximity to each other, with the sanitary sewer system located
 16 *above* the MS4 in most areas. *Id.* at p. 80, § 4.2. The Regional Board “believes this is a clear
 17 conduit for indirect cross connection anywhere that both systems have nearby defects.” Trial Ex.
 18 27 (Order R5-2021-0001) at p. 5, finding 16.

19 The Regional Board further concluded that sampling data showed “various waste
 20 constituents have been consistently detected in the [MS4] discharge[,]” and that the discharges
 21 from the MS4 “were clear violations of the Clean Water Act.” Trial Ex. 22 (Review of
 22 Stormwater System Report) at p. 18, § 8. Multiple times, Regional Board staff determined the
 23 “list of recommended repairs to the stormwater and sanitary sewer system ... must be completed
 24 and Best Management Practices must be implemented in order to adequately protect downstream
 25 beneficial uses.” *Id.*, see also *id.* at p. 4, § 2.2 (“This issue will need to be addressed more
 26 aggressively going forward under the MS4 permit.”); *id.* at p. 19, § 8 (“... no improvements have
 27 been made to the site to address the waste constituents detected in stormwater system or the
 28 defects in both system.”).

The Regional Board's conclusions are consistent with Dr. Emerick's opinion that the sewage contained in the MS4 most likely comes from the sanitary sewer system. Notably, as Dr. Emerick will testify, during Plaintiffs' dry-weather inspections in March 2022, the MS4 had water within the system, and the sampling results of that water included high concentrations of bacteria, as well as pharmaceuticals. Trial Ex. 525 (March 9, 2022 Sampling Data) (fecal coliform was between 79-1600 MPN/100 mL; total coliform was greater than 1600 MPN/100 mL in each sample; *E. coli* was present in all samples, pp. 759-806 (sampling showed the presence of pharmaceuticals). Dr. Emerick will testify that the presence of these pollutants, particularly in dry weather, demonstrates that wastewater is moving through the MS4, in violation of Provision B.3.

Thus, the evidence demonstrates that untreated sewage is present in the MS4. When CDCR opens the slide gates in the MS4 during rain events, all non-stormwater in the MS4, including untreated sewage, commingles with stormwater and discharges directly to Mule Creek. Trial Ex. 47 (Interim Disposal Plan) at p. 4, § 3.0; see generally, Trial Exs. 454-488 (discharge notifications).

G. CDCR's Failure to Fix the Infrastructure Defects and/or Implement Additional BMPs to Correct Its Violations of the Small MS4 Permit

CDCR is well-aware of the significant infrastructure deficiencies that result in this regular discharge of polluted water to Mule Creek, which their own consultant identified in 2019. Trial Ex. 51 (Stormwater Collection System Investigation Report of Findings) at pp. 40-42, 78-82, §§ 3.4.2.3, 4.1 – 4.2.2; Trial Ex. 55 (Appendix 23); Trial Ex. 27 (Order R5-2021-0001) at p. 5, ¶ 16. At that time, the consultant and the Regional Board indicated that CDCR must fix those defects. *Id.* Yet, CDCR's designated representatives stated that CDCR has failed to make any of those improvements three years later. Dkt. No. 103 at 18:7-10.

Moreover, CDCR has reported they regularly discharge large volumes of irrigation water through the MS4 into Mule Creek. Trial Ex. 47 (Interim Disposal Plan) at p. 4, § 3.0; see generally, Trial Exs. 454-488 (discharge notifications). CDCR has again not fixed the problem and, in fact, admitted they will not come into compliance with Provision B.3 with regard to their irrigation discharges, until February 2025. Trial Ex. 63 (May 13, 2022 Non-Stormwater Discharge

1 Elimination Plan) at MCSP0058684.

2 Further, the evidence will show that CDCR has not added or improved their BMPs since
3 these actions were filed. CDCR's representative designated to speak to the BMPs and the pollutants
4 intended to be addressed by each BMP, Anthony Orta, stated he was only aware of BMPs intended
5 to reduce sediment, not any such measures to reduce metals or *E. coli*. Dkt. No. 108 at 17:20-25.
6 In addition, according to CDCR's designated representative, CDCR has not made any changes to
7 the storm sewer system or the MS4 since Fall 2019, except for applying for funding to replace the
8 irrigation system. In November 2022, the Regional Board twice notified CDCR that it failed to
9 submit any BMP plan to address discharges that contribute to exceedances of metals WQS in Mule
10 Creek. Trial Exs. 35-36 (Nov. 3, and Nov. 30 letters); see Dkt. No. 108 at 17:17-20.

11 For example, on February 11, 2022, November 3, 2022, and November 30, 2022, the
12 Regional Board notified CDCR of exceedances of the RWL provision in Small MS4 Permit
13 Provision D. In accordance with the Small MS4 Permit, the Regional Board required CDCR to
14 "[i]nclude best management practices (BMP) to be implemented to address the receiving water
15 exceedances and a schedule of the BMP implementation. BMPs which can immediately address
16 the exceedances must be proposed and immediately implemented." Trial Ex. 33 (Feb. 11, 2022
17 letter) at p. 2, ¶ 4. Despite receiving this notice from the Regional Board, CDCR failed to submit
18 a BMP plan to address the bacteria and metals pollutants in the Prison's polluted discharges.

19 In November 2022, the Regional Board again, twice notified CDCR that the Prison
20 violated Provision D and that CDCR had still failed to submit any BMP plan to address either the
21 dry weather or storm water discharges that contribute to water quality exceedances in Mule
22 Creek. Trial Exs. 35-36 (Nov. 3, and Nov. 30 letters). These notifications required CDCR to
23 "identify the source(s) of the aluminum, iron, manganese, and zinc" and to "describe the BMPs
24 that are being implemented to eliminate the exceedances from those sources and what additional
25 BMPs will be implemented. An implementation schedule must also be included ... [and] be
26 submitted ... by 17 February 2023." Trial Ex. 36 (Nov. 30 letter) at p. 2, ¶ 2.

27 CDCR failed to submit the source identification and BMP plan by February 17, 2023. On
28 February 24, 2023, CDCR belatedly submitted a "Revised Non-Storm Water Discharge

Elimination Plan” that did not include any source identification analysis. Trial Ex. 68 (Revised NSWDP Plan). Further, all BMPs identified in the Revised Non-Storm Water Discharge Elimination Plan were developed or implemented before this action began. That is, CDCR did not develop new BMPs to address the new violations that the Regional Board had identified and required CDCR to address. Rather, it tried to recycle previously-identified or previously-required BMPs.

Finally, the ditches between MCSP5 and MCSP2 and between MCSP6 and MCSP3, which CDCR refers to as “bioswales” and touts as a stormwater BMP, were in place before the Facility was covered by the Small MS4 Permit, and CDCR’s representative stated that CDCR has not made any changes to the ditches since that time. *See* Dkt. No. 108 at 18:2-7. Moreover, Mr. Orta did not know whether or how the ditches were designed, whether Defendants had ever evaluated their effectiveness, or even whether the purpose of the ditches is to reduce pollutants.

III. SUMMARY OF POINTS OF LAW

A. Points of Law Relevant to All Claims

1. Plaintiffs Have Article III Standing.

Plaintiffs filed a motion for partial summary judgment on June 28, 2022, arguing that both Plaintiffs met the requirements of Article III standing. Dkt. No. 45. On August 29, 2022, the Court granted partial summary judgment, finding that both Plaintiffs had standing. Dkt. No. 60 at 13:9-10. The Court’s pretrial order also determined both Plaintiffs have Article III standing. Dkt. No. 110 fn. 3. No further legal or factual argument is anticipated on this point.

2. The Clean Water Act Is a Strict Liability Statute.

The Clean Water Act is a strict liability statute and does not excuse “de minimis” or “rare” violations. *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480, 1491 (9th Cir. 1987), *rev’d on other grounds*, 485 U.S. 931, *amended by* 853 F.2d 667 (9th Cir.), *remanded to*, 716 F.Supp. 429 (N.D. Cal. 1988) (CWA and the regulations promulgated under it “make no provision for ‘rare’ violations”); *Hawaii’s Thousand Friends v. City & Cnty. of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993). To establish a violation of the Act, a plaintiff need only prove that a discharger has violated the terms and conditions of its NPDES permit. 33 U.S.C. §§

1 1311(a), 1342(k); *Hawaii's Thousand Friends*, 821 F. Supp. at 1392 (“NPDES compliance is a
2 matter of strict liability and a defendant’s intent and good faith are irrelevant”).

3 Here, the evidence will conclusively establish that CDCR has and continues to violate the
4 Act by discharging polluted water to Mule Creek in violation of its Small MS4 Permit. CDCR
5 must be held strictly liable for these violations related to its discharges from its MS4, regardless
6 of whether other sources, including natural sources, contribute pollutants to its MS4 discharges or
7 Mule Creek. *See National Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d
8 1194, 1206 (9th Cir. 2013). Even if the pollutants that CDCR discharges from its MS4 originated
9 elsewhere, CDCR is still responsible under the Act for the pollutants in its discharges. *Id.* In fact,
10 the Court has already clearly stated that the Small MS4 Permit does not excuse contributions from
11 background sources. *see also* Dkt. No. 103 at 20-22.

12 Second, although other sources upstream of the Prison may be polluting Mule Creek (i.e.,
13 CDCR’s purported “background argument”), CDCR is responsible for its contribution to WQS
14 exceedances in Mule Creek. See Trial Ex. 2 (MS4 Permit) at pp. 17, 19, provs. B.2, B.3, D.1; see
15 also Trial Ex. 22 (RB Review of Storm Water System Report) at p. 16, §6. Thus, as explained
16 further below (*infra* §§ III.G.1, III.G.4), CDCR violates its Small MS4 Permit when its discharges
17 include pollutants in excess of applicable WQS when Mule Cree, downstream of the Prison,
18 exceeds WQS.

19 **3. The Act Prohibits CDCR from Impeaching Its Monitoring Reports.**

20 The law is settled in the Ninth Circuit that a discharger’s self-monitoring reports in a
21 Clean Water Act lawsuit provide: (1) conclusive evidence of an exceedance of a permit
22 limitation; and (2) cannot be impeached by the discharger based on alleged sampling error. *Sierra*
23 *Club v. Union Oil Company of California*, 813 F.2d 1480, 1492 (9th Cir. 1987), *rev'd on other*
24 *grounds*, 485 U.S. 931, *amended by* 853 F.2d 667 (9th Cir.), *remanded to*, 716 F.Supp. 429 (N.D.
25 Cal. 1988). The NPDES program fundamentally relies on self-monitoring, and such reports
26 constitute admissions of noncompliance that bind the defendant in an enforcement proceeding.
27 *Save Our Bays and Beach v. City and County of Honolulu*, 904 F.Supp. 1098, 1138 (D. Haw.
28 1994). A discharger cannot object to the quality of its own sampling and is therefore bound by the

admissions of noncompliance in its own reports. *Santa Monica Baykeeper v. Kramer Metals, Inc.* 619 F.Supp.2d 914, 927 (C.D. Cal. 2009). The Ninth Circuit explained the rationale for this rule as follows:

Were we to accept Union Oil's argument regarding the use of sampling errors to excuse reported permit exceedances, we would be sanctioning countless additional hours of NPDES litigation and created new, complicated factual questions for district courts to resolve. As indicated by the legislative history, Congress hoped to limit such situations. In addition, if each self-monitoring report is to be considered only prima facie rather than conclusive evidence of an exceedance of a permit limitation, citizen groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365. While a permittee's publicly filed reports might clearly indicate that illegal pollution was taking place, the permittee might have additional information unavailable to citizens groups indicating that sampling error rendered the reports meaningless. Finally and most importantly, allowing permittees to excuse their reported exceedances by showing sampling error would create the perverse result of rewarding permittees for sloppy laboratory practices. Such an approach would surely undermine the efficacy of the self-monitoring program.

Sierra Club, 813 F.2d at 1492.

The Ninth Circuit and its District Courts have consistently applied this settled law to Clean Water Act citizen suits. *Natural Resources Defense Council, Inc. v. County of Los Angeles* 725 F.3d 1194, 1207-1208 (9th Cir. 2013) (holding that County's self-monitoring reports conclusively demonstrated violations of receiving water limitations); *Santa Monica Baykeeper v. International Metals Ekco, Ltd.* 619 F.Supp.2d 936, 948 (C.D. Cal. 2009) (discharger cannot object to the quality of its own sampling and cannot dispute the information contained in its annual reports); *San Francisco Baykeeper v. W. Bay Sanitary Dist.* 791 F.Supp.2d 719, 755 (N.D. Cal. 2011) ("A monitoring report that shows a water sample with pollutant discharges in excess of permit limits is conclusive evidence of a violation").

Here, CDCR's monitoring reports provide conclusive evidence of hundreds of violations and cannot be impeached by CDCR based on settled Ninth Circuit law. See *Sierra Club*, 813 F.2d at 1492. Therefore, the Court should exclude any and all evidence by CDCR that questions the accuracy of its sampling results. *Id.* If this evidence were not excluded, Plaintiffs will be required to present evidence that every sample result is accurate. Thus, Plaintiffs would be forced to call

each and every person who collected a sample at the Prison and each and every lab technician that analyzed the samples received by CDCR over the last three to four years. Because the Clean Water Act prohibits CDCR from questioning the accuracy of its own samples, calling all of these witnesses is a futile exercise and a waste of the Court's limited time and resources.

4. The *E. Coli* and Metals Water Quality Standards Apply to Mule Creek.

To understand CDCR's violations, the Court must understand the water quality standards that apply to Mule Creek. Under the Act, states such as California are required to develop water quality standards. 33 U.S.C. § 1313. Water quality standards consist of beneficial uses (known as "designated uses" under federal law) of the water body in question and the water quality objectives (known as "water quality criteria" under federal law) that must be maintained to support those beneficial uses. 33 U.S.C. § 1313(c)(2)(A) (water quality standards consist of "designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses"); *see, also, City of Arcadia v. State Water Resources Control Bd.*, 191 Cal.App.4th 156, 163 (2010); Water Code §§ 13050(f) (defining "beneficial uses") and 13050(h) (defining "water quality objectives"); 40 C.F.R. Part 131. These technical concepts can be reduced to simple ideas—the beneficial uses define the types of things we want our waters to be used for (drinking water, swimming, fishing, etc.) and the water quality criteria define the quality of the water needed to reasonably support those uses.

In California, the beneficial uses of water bodies and their water quality criteria are primarily established in what are commonly referred to as "Basin Plans." Cal. Water Code § 13050(j). Once established in a Basin Plan, beneficial uses and water quality criteria *cannot be changed without an amendment of the Basin Plan*. *California Assn. of Sanitation Agencies v. State Water Resources Control Bd.*, 208 Cal.App.4th 1438, 1458-1459 (2012); *see also*, Central Valley Regional Water Quality Control Board Resolution R5-2017-0088¹¹ (finding that the

¹¹ Available at https://www.waterboards.ca.gov/rwqcb5/board_decisions/adopted_orders/resolutions/r5-2017-0088_res.pdf and judicially noticeable non-hearsay pursuant to Federal Rules of Evidence, Rules 201 and 803(8) and self-authenticating pursuant to Federal Rules of Evidence, Rule 902(5). 83653.00001\41092707.6

1 “Board may only exempt water bodies in the Sacramento and San Joaquin River Basins and the
 2 Tulare Lake Basin from MUN beneficial use designation by amending the Basin Plan”).
 3 Specifically, beneficial uses and water quality criteria cannot be changed through Regional Board
 4 staff action or through the permitting process. *Id.*

5 The Basin Plan establishes the beneficial uses of Mule Creek and the water quality
 6 objectives necessary to support those beneficial uses. Two beneficial uses and their water quality
 7 objectives are relevant here: (1) municipal and domestic supply (MUN) beneficial use and the
 8 metal standards that support the MUN beneficial use; and (2) contact recreation (REC-1)
 9 beneficial use and the bacteria objectives that support the REC-1 beneficial use.

10 i. The MUN and REC-1 Uses Apply to Mule Creek.

11 Like many water bodies in California, Mule Creek is not specifically identified in the
 12 Basin Plan. Under California law, the beneficial uses of Mule Creek are therefore established in
 13 two ways as explained in the Basin Plan. First, and critically for this case, the State Board has
 14 determined that all waterbodies in the State shall have a Municipal and Domestic Supply (MUN)
 15 beneficial use, unless exempted pursuant to State Water Board Resolution No. 88-63 (“Drinking
 16 Water Policy”), which is, by reference, a part of the Basin Plan. Trial Ex. 16 (Basin Plan) at p. 2-
 17 3; §2.1. The Basin Plan provides that “[w]ater bodies within the basin that do not have beneficial
 18 uses designated in Table 2-1 *are assigned MUN designations* in accordance with the provisions of
 19 State Water Board Resolution No. 88-63 which is, by reference, a part of this Basin Plan . . .” *Id.*;
 20 see also, *California Assn. of Sanitation Agencies v. State Water Resources Control Bd.*, 208
 21 Cal.App.4th at 1463. The list of exempted waterbodies are listed in Appendix 44 of the Basin
 22 Plan. *Id.* The Regional Board did not include Mule Creek in Appendix 44, *id.*; therefore, by law
 23 and the plain language of the Basin Plan, Mule Creek has been assigned the MUN beneficial use.

24 Second, Mule Creek has a MUN and REC-1 beneficial use based on a separate and
 25 independent concept known as the tributary rule. The Basin Plan provides that the “beneficial
 26 uses of any specifically identified water body generally apply to its tributary streams . . .” Trial
 27 Ex. 16 (Basin Plan) at p. 2-3, § 2.1; see also, *California Assn. of Sanitation Agencies v. State*
 28 *Water Resources Control Bd.*, 208 Cal.App.4th at 1458. This means that Mule Creek has the

1 same beneficial uses of downstream waters, which includes the Mokelumne River and the Delta.
 2 The beneficial uses of the Delta include REC-1 and MUN. Trial Ex. 16 (Basin Plan) at pp. 2-11,
 3 2-14, tbl. 2-1.

4 These beneficial uses of Mule Creek are well-reflected in CDCR's permit to operate its
 5 WWTP, which identifies the beneficial uses of Mule Creek as follows: "municipal and domestic
 6 supply; agricultural supply; industrial process and service supply; water contact recreation; non-
 7 contact water recreation; warm freshwater habitat; cold freshwater habitat; migration for aquatic
 8 organisms; spawning, reproduction, and/or early development; wildlife habitat and navigation."
 9 See Trial Ex. 8 (Order R5-2015-0129) pp. 14-15, finding 49.

10 (1) E. Coli and Metals Water Quality Standards Apply.

11 Based on the REC-1 and MUN beneficial uses assigned to Mule Creek, the following
 12 water quality standards apply to Mule Creek:

13 *E. coli* to support REC-1 beneficial use designation: 320 colony forming units (cfu) per
 14 100/mL under a statistical threshold value (STV), where no more than 10% of samples may
 15 exceed this limit in a calendar month. Trial Ex. 5 (Bacteria Objectives) at pp. 2, 3, § III.E.2, tbl. 1.
 16 In addition, the geomean standard prohibits a geomean magnitude of greater than 100 cfu/100mL
 17 in any six-week period. *Id.* CDCR appears to believe that *E. coli* is not the proper water quality
 18 objective because of the salinity of Mule Creek. ECF 106, p.7. However, the Regional Board
 19 specifically and repeatedly required CDCR to analyze its samples for *E. coli*. Trial Ex. 20 (13383
 20 Order, dated Aug. 6, 2020) at pp. 5-7, tbls. B-C; Trial Ex. 24 (13383 Order, dated Dec. 22, 2020)
 21 at pp. 7-9, tbls. B-C; Trial Ex. 31 (13383 Order, dated Nov. 29, 2021) at pp. 6-9, tbls. B-C; see
 22 also Trial Ex. 11 (13267 Order) at p. 3, tbl 1.

23 Metals standards to support MUN beneficial use designation:

24 Title 22 of the California Code of Regulations (for aluminum, iron, manganese), Trial Ex.
 25 16 (Basin Plan) at pp. 3-3, 3-4, § 3.1.3:

Constituent	MCLs / Units
Aluminum	200 µg/L
Iron	300 µg/L

Manganese	50 µg/L
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California Toxics Rule (for copper, lead, and zinc), Trial Ex. 16 (Basin Plan) at p. 4-15, § 4.2.1.1.15:

Constituent	CTR Criteria / Units
Copper	9 µg/L dissolved (Chronic)
Lead	2.5 µg/L dissolved (Chronic) 3.2 µg/L total (Chronic)
Zinc	117 ug/L dissolved (Acute) 120 µg/L total (Acute)

5. Sampling at MCSP2, MCSP3, MCSP5, and MCSP6 Are All Representative of the Prison's MS4 Discharges.

The Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. *Natural Resources Defense Council, Inc. v. County of Los Angeles* 725 F.3d 1194, 1207 (9th Cir. 2013). An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *Id.* Applied to municipal storm water, “EPA regulations make clear that while MS4 permits need not require monitoring of each stormwater source at the precise point of discharge, they may instead establish a monitoring scheme ‘sufficient to yield data which are *representative of the monitored activity . . .*’” *Id.* at 1209 (emphasis in original). If such representative monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, the monitoring data conclusively demonstrate that the defendants are not in compliance with the permit conditions. *Id.*

As noted above, CDCR, pursuant to Regional Board direction, has monitored its compliance with the Small MS4 Permit at several representative monitoring locations at different times. *See supra* § II.D. All of these monitoring locations are “representative of the volume and nature of the monitored discharge” and are intended to “ensure compliance” with the Small MS4

1 Permit. *Id.* Therefore, regardless of the location of the different monitoring stations, as a matter of
 2 NPDES Permit construction, the data from any of those locations provides conclusive evidence of
 3 a violation. *See Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d at
 4 1207 (“as a matter of permit construction, the monitoring data conclusively demonstrate that the
 5 County Defendants are not ‘in compliance’ with the Permit conditions. Thus, the County
 6 Defendants are liable for Permit violations.”).

7 Defendants have repeatedly admitted that sampling locations MCSP2 and MCSP3 are
 8 MS4 outfalls to Mule Creek. *See, e.g.*, ECF 95-2 at ¶¶ 24, 56; ECF 95-4 at ¶ 4.

9 Moreover, the evidence will show that samples taken at MCSP5 and MCSP6, although
 10 slightly upstream of the MCSP2 and MCSP3 outfalls to Mule Creek, respectively, accurately
 11 represent pollutant concentrations in discharges to Mule Creek. *See supra* § II.D. Thus, as a
 12 matter of law and fact, the sampling results at MCSP5 and MCSP6 are representative of the
 13 Prison’s MS4 discharges.

14 **6. Violations Were Ongoing When the Complaints Were Filed.**

15 Clean Water Act § 505, 33 U.S.C. § 1365 “confers jurisdiction over citizen suits when the
 16 citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation . . .”
 17 *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987). A plaintiff does not
 18 need to show ongoing violations throughout the litigation. *See Gwaltney*, 484 U.S. at 66-67. A
 19 plaintiff’s burden is met when they allege an ongoing violation when the complaint is filed. *See*
 20 *Nat. Res. Def. Council v. Texaco Ref. & Mktg. Inc.*, 2 F.3d 493, 503 (3d Cir. 1993). Thus, only
 21 facts evidencing whether “defendant’s continued violation had been completely eradicated when
 22 citizen-plaintiffs filed suit” are relevant to this inquiry. *Chesapeake Bay Found. v. Gwaltney*, 844
 23 F.2d 170, 172 (4th Cir. 1988), *on remand from* 484 U.S. 49 (1987).

24 Courts have recognized that a citizen-plaintiff may prove a person is “in violation” in two
 25 ways: “(1) by proving violations that continue on or after the date the complaint is filed or (2) by
 26 adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a
 27 recurrence in intermittent or sporadic violations.” *Sierra Club v. Union Oil Co.*, 853 F.2d 667,
 28 671 (9th Cir.1988) (internal quotations omitted). “Intermittent or sporadic violations do not cease

1 to be ongoing until the date when there is no real likelihood of repetition.” (*Sierra Club*, 853 F.2d
 2 at 671 (internal quotations omitted).) As a result, a history of repeated, pre-complaint violations
 3 of the Clean Water Act can create a reasonable likelihood the violations will recur. *See Cmty.*
 4 *Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 954 (9th Cir. 2002).
 5 Further, when proving a reasonable likelihood of a recurring violation, the past and recurring
 6 violations do not need to be of the same type. *Inland Empire Waterkeeper v. Corona Clay Co.*, 17
 7 F.4th 825, 829 (9th Cir. 2021), cert. denied (2022).

8 Here, the evidence will establish ongoing violations of the Small MS4 Permit and the Act
 9 under both methods. First, CDCR’s self-monitoring reports demonstrate that violations have
 10 continued after the complaints were filed and as recently as February 6, 2023, the last reported
 11 sampling event. The December 17, 2020 samples and February 6, 2023 sampling at MCSP2 and
 12 MCSP3, which CDCR concedes are outfalls to Mule Creek, show the Prison’s MS4 discharges
 13 exceeded aluminum, iron, lead, zinc, and *E.coli* WQS post-complaint. Ashby Testimony; Trial
 14 Ex. No. 67 (Feb. 6, 2023 Sampling Results). Moreover, CDCR has reported numerous
 15 exceedances of WQS at MCSP5 and MCSP6, which, as explained below, are legally and factually
 16 representative of the Prison’s MS4 discharges.

17 Second, the evidence will also establish that past violations are “reasonably likely to
 18 recur.” CDCR’s sampling at MCSP2 and MCSP3 demonstrate years of violations of the Small
 19 MS4 Permit through December 2020. Ashby Testimony. As explained above, *supra* § II.G,
 20 CDCR has not added or improved the Prison’s BMPs. Thus, the evidence supports the
 21 conclusion that violations are likely to recur.

22 **B. Points of Law Specific to Each of Plaintiffs’ Claims**

23 **1. Violations of Provision B.2 of the Small MS4 Permit**

24 Provision B.2 prohibits “[d]ischarges of storm water from the MS4 to waters of the U.S.
 25 in a manner causing *or threatening to cause* a condition of pollution or nuisance as defined in
 26 Water Code § 13050 are prohibited.” Trial Ex. 2 (Small MS4 Permit) at § B.2 (emphasis added).
 27 Water Code section 13050(1)(1)(A) defines “pollution” as “an alteration of the quality of the
 28 waters of the state by waste to a degree which unreasonably affects ... the waters for beneficial

uses.” WQS establish the maximum level of pollution that can exist in a water while still protecting the waterbody’s beneficial uses. *See* ECF No. 95-7 at 560; *see* 33 U.S.C. § 1313 (2)(A); *see also* *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994) (WQS “prevent water quality from falling below acceptable levels.”). Therefore, discharges above a water quality standard, as a matter of law, threaten to “unreasonably affect[]” Mule Creek’s beneficial uses and, thus, are pollution. Cal. Water Code §13050(l).

Moreover, the pollutants in the Prison’s MS4 discharges contain waste. The Water Code definition of “waste” includes:

sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of disposal.”

Cal. Water Code § 13050(d). This broad definition of “waste” easily includes the bacteria and metals contained in the polluted water CDCR discharges because they are “associated with human habitation, or of human or animal origin.” *Id.*; *see also* Section II.F, above.

Further, the fact that the discharges threaten to cause pollution also renders them a nuisance.¹² *Jordan v. City of Santa Barbara*, 46 Cal.App.4th 1245, 1257 (1996) (“[p]ollution of water constitutes a public nuisance”); *accord Newhall Land & Farming Co. v. Superior Court*, 19 Cal.App.4th 334, 341 (1993). Moreover, because metals and *E. coli* WQS are established to protect uses related to human health (i.e., drinking water and water contact recreation uses, respectively), discharges above WQS, as a matter of law, are or threaten to be “injurious to health” and, thus, are a nuisance. Cal. Water Code § 13050(m)(1).

Finally, this court and others have also determined that “threatening to cause a condition of pollution a nuisance” does not require Plaintiffs to establish that pollution or nuisance has occurred. *See* Dkt. No. 103 at 10:10-26; *see also San Diego Gas & Electric Co. v. San Diego*

¹² “‘Nuisance’ means anything which meets all of the following requirements:(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of wastes.” Cal. Water Code § 13050(m).

1 *Regional Water Quality Control Bd.*, 36 Cal.App.5th 427, 439 (2019). Therefore, Plaintiffs need
 2 only show that CDCR's discharges *threaten* to cause a condition of pollution or nuisance.
 3 Because the water quality standards that apply to Mule Creek are expressly designed to support
 4 Mule Creek's beneficial uses, discharges that exceed those standards meet Plaintiffs' burden.
 5 CDCR's monitoring reports conclusively demonstrate that the MS4 discharges exceeded water
 6 quality standards on hundreds of occasions. Each exceedance threatens to cause a condition of
 7 pollution or nuisance and thus violates Provision B.2 for a total of 160 violations between April
 8 24, 2019 and February 2023.

9 **2. Violation of Provision B.3 of the Small MS4 Permit**

10 Provision B.3 of the Small MS4 Permit requires that "[d]ischarges through the MS4 of
 11 material other than storm water shall be effectively prohibited, except as allowed under this
 12 Provision or as otherwise authorized by a separate NPDES permit." As detailed below, the
 13 evidence establishes that untreated sewage is entering and discharging from the MS4 via defects
 14 in the sanitary sewer system. See *supra* § II.F. The presence of pharmaceuticals and personal care
 15 products, particularly in dry weather as was found in the Prison's MS4, demonstrates that
 16 wastewater is moving through the MS4, in violation of Provision B.3. See *Hawai'i Wildlife Fund*
 17 *v. County of Maui*, 550 F.Supp.3d 871, 882 (D. Haw. 2021) (finding pharmaceuticals
 18 demonstrates presence of wastewater).

19 In addition, CDCR reported and the Regional Board has confirmed that CDCR regularly
 20 discharges irrigation water from its MS4. Trial Ex. 24 (13383 Order, Dec. 22, 2020, ex) at p. 3,
 21 finding 7. These discharges are not authorized non-stormwater discharges. Regional Board "staff
 22 determined that the irrigation runoff (i.e., potable water from the landscaped areas) does not meet
 23 the Small MS4 General Permit's definition of incidental runoff because the runoff is due to
 24 defects in the irrigation system and that there may be occasional discharges of excessive irrigation
 25 runoff to Mule Creek." Trial Ex. 34 (Comments to the Non-Storm Water Discharge Elimination
 26 Plan, April 11, 2022) at p. 1. CDCR's discharges of wastewater and irrigation runoff through the
 27 MS4 violate Provision B.3.

28 Further, Defendants have not yet taken any action to address these sources of non-

1 stormwater; therefore, Defendants have not “effectively prohibited non-stormwater,” as required
 2 by Provision B.3. In 2019, Defendants stated, and the Regional Board concurred, that the defects
 3 in the sanitary sewer system should and would be fixed to prevent wastewater from commingling
 4 with stormwater. *See* Trial Ex. 22 (Review of Stormwater System Report) at p. 4, § 2.2; p. 18,
 5 § 8; p. 19, § 8. Yet, in August 2022, Defendants’ representative stated that those repairs had not
 6 yet been completed. Similarly, Defendants have not effectively prohibited irrigation flows from
 7 discharging through the MS4. Defendants have stated, under penalty of perjury, that they will not
 8 come into compliance with Provision B.3 with regards to their irrigation discharges until
 9 February 2025. Trial Ex. 63 (May 13, 2022 Non-Stormwater Discharge Elimination Plan) at
 10 MCSP0058684.

11 Thus, the evidence shows that non-storm water has been entering the MS4 since at least
 12 January 2018 when the Regional Board inspected the Facility. Trial Ex. 11 (13267 Order, Feb.
 13 14, 2008) at p. 2. Every time it rains and CDCR opens the slide gates, the non-stormwater present
 14 is discharged into Mule Creek. Between April 2019 and February 6, 2023, the Prison’s MS4
 15 discharged non-stormwater to Mule Creek—and violated Provision B.3—on 156 days. *See* note 2
 16 above. CDCR has taken no actions, let alone effectively prohibited, these non-stormwater
 17 discharges. Thus, CDCR has been violating Provision B.3 since they became subject to the Small
 18 MS4 Permit, and this violation is ongoing.

19 3. Violation of Provision C.1 of the Small MS4 Permit

20 Provision C.1 of the Small MS4 Permit provides that CDCR “shall implement controls as
 21 required by this Order to reduce the discharge of pollutants from [its] MS4 to waters of the U.S.
 22 to the MEP.” As defined in the Permit, MEP is the “minimum required performance standard for
 23 implementation of municipal storm water management programs to reduce pollutants in storm
 24 water.” Trial Ex. 2 (Small MS4 Permit) at p. 281, attach. I, p. 5. According to the Permit, “MEP
 25 is the cumulative effect of implementing, evaluating, and making corresponding changes to a
 26 variety of technically appropriate controls are implemented in the most effective manner. This
 27 process of implementing, evaluating, revising, or adding new BMPs is commonly referred to as
 28 the iterative process.” *Id.*

As further explained in the Fact Sheet to the Permit, the “MEP standard requires Permittees to apply Best Management Practices (BMPs) that are *effective* in reducing or eliminating the discharge of pollutants to the waters of the U.S.” Trial Ex. 3 (NPDES Permit Fact Sheet) at p. 20, § X (emphasis added). “Permittees must *conduct and document* evaluation and assessment of each relevant element of the program, and of the program as a whole, and revise activities, control measures/BMPs, and measurable goals, as necessary to meet MEP.” *Id.* (emphasis added). “MEP is the cumulative result of implementing, evaluating, and creating corresponding changes to a variety of technically appropriate and economically feasible BMPs, *ensuring that the most appropriate BMPs are implemented in the most effective manner.*” *Id.* (emphasis added).

The evidence at trial will demonstrate that CDCR has failed entirely to satisfy the MEP requirements of Provision C.1. CDCR’s BMPs have not been effective at reducing the discharge of polluted water to Mule Creek. CDCR’s discharges, in fact, continue to regularly violate applicable water quality standards, thus demonstrating that CDCR’s actions are not effective or consistent with MEP. *See Santa Monica Baykeeper v. Kramer Metals*, 619 F.Supp.2d 914, 924-925 (C.D. Cal. 2009) (exceedances of EPA benchmark levels are relevant to evaluating the efficacy of a facility’s BMPs and “sampling orders of magnitude in excess of the benchmark levels is evidence supporting Baykeeper’s contention that Kramer did not have BMPs that achieve BAT/BCT.”).

In addition, the evidence will demonstrate that CDCR has not assessed its BMPs or used that assessment to update and enhance them. The evidence will show that CDCR has taken no steps to improve the swales that lead to the two discharge points to Mule Creek. *See supra* § II.G; see also Dkt. No. 103 at 17-18 (Court’s summary of evidence that CDCR has not engaged in iterative process). For example, CDCR’s consultant in 2019 identified multiple corrections that are needed in its MS4 and sewer infrastructure, yet CDCR has not implemented even these recommendations. Trial Ex. 51 (Stormwater Collection System Investigation Report of Findings) at pp. 40-42, 78-82, §§ 3.4.2.3, 4.1 – 4.2.2; Trial Ex. 55 (Appendix 23); Trial Ex. 27 (Order R5-2021-0001) at p. 5, ¶ 16. As explained in more detail below, CDCR has regularly failed to

engage in the iterative process required to comply with MEP, *even when expressly directed by the Regional Board to do so*. Such inactions are the antithesis of MEP. These and similar failures demonstrate that CDCR has violated the Provisions of C.1.

4. Violation of Provision D of the Small MS4 Permit

Provision D of the Small MS4 Permit provides that “[d]ischarges shall not cause or contribute to an exceedance of water quality standards contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable Regional Water Board Basin Plan.” Trial Ex. 2 (Small MS4 Permit) at p. 19, prov. D (Receiving Water Limitations). The Small MS4 Permit also provides that when exceedances of the receiving water limitations (RWL) provision occur, the discharger is required to engage in a process to assess the violation and implement additional best management practices (BMPs) to prevent or reduce the pollutants that are causing or contributing to the violation. Trial Ex. 2 (Small MS4 Permit) at p. 19, prov. D.1-D.4. Engaging in this process is required but does not excuse the RWL violations that have already occurred. See Dkt. No. 103 at 25-26 (Court determining that engaging in iterative process does not excuse liability); see also *Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d 880, 897-98 (9th Cir. 2011), *rev’d on other grounds* 568 U.S. 78 (2013), *modify by Natural Resources Defense Council v. County of Los Angeles*, 725 F.3d 1197 (9th Cir. 2013); *see also*, Trial Ex. 3 (Small MS4 Permit Fact Sheet) at p. 22 (noting that the iterative process does not provide a “safe harbor” to MS4 permittees.). In fact, failure to engage in the process outlined in the Small MS4 Permit to address RWL violations is itself a separate violation.

This Court has already held that Plaintiffs need not show the Prison’s discharges are the sole cause of an exceedance of a WQS in Mule Creek. Dkt. No. 103 at 25:4-7. The discharges “contribute” to an exceedance when Mule Creek is exceeding WQS for a pollutant *and* the Prison discharges that same pollutant at or about the same time. *Natural Resources Defense Council v. County of Los Angeles*, 673 F.3d 880, 898-899 (9th Cir. 2011), *rev’d on other grounds* 568 U.S. 78 (2013), *modify by Natural Resources Defense Council v. County of Los Angeles*, 725 F.3d 1197 (9th Cir. 2013) *I*, 673 F.3d 880, 898-899; *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d at 1204-1207. Under these circumstances, the discharger is

1 “contributing” to the exceedances in the receiving water by adding additional pollutants to a
 2 water that is already exceeding standards. Ms. Ashby will explain that CDCR’s self-monitoring
 3 reports demonstrate these conditions exist on multiple occasions for both *E. coli* and metals.

4 By counting a violation only when discharges and Mule Creek both exceed WQS at or
 5 about the same time, Ms. Ashby has taken a very conservative approach that is, in fact, higher
 6 than is legally required. Numerous courts have found that a violation of a receiving water
 7 limitation occurs whenever discharges exceed WQS, with no evidence that the receiving water is
 8 in exceedance. See *Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F.Supp.2d 914, 926-929
 9 (C.D. Cal. 2009); *Santa Monica Baykeeper v. International Metals Ecko, Ltd.*, 619 F. Supp.2d
 10 936, 947-50 (C.D. Cal. 2009); *Cal. Sportfishing Prot. All. v. River City Waste Recyclers*, 205 F.
 11 Supp. 3d 1128, 1151 (E.D. Cal. 2016); *Cal. Sportfishing Prot. All. v. Chico Scrap Metal*, 124 F.
 12 Supp. 3d 1007, 1020-22 (E.D. Cal. 2015). Courts have also found similar violations whenever a
 13 facility discharges a pollutant into a waterbody that exceeds WQS for that pollutant, regardless of
 14 whether the discharge itself exceeds the WQS. See *American Iron and Steel Institute v. E.P.A.*,
 15 115 F.3d 979, 1000 (D.C. Cir. 1997) (upholding EPA’s presumption that “a source that
 16 contributes a pollutant to a body of water in which the standard for that pollutant has been
 17 exceeded has the reasonable potential to contribute to that exceedance.”).

18 Thus, Ms. Ashby’s approach provides CDCR with the “benefit of the doubt.” Under this
 19 approach, Ms. Ashby will testify that CDCR has violated the RWL provision at least 72 times
 20 during the time period relevant to this action. Ms. Ashby’s opinion is consistent with the findings
 21 of the Regional Board. By letter dated February 11, 2022, when the Regional Board notified
 22 CDCR that the Prison’s discharges repeatedly exceeded the receiving water limitations. Trial Ex.
 23 33 (Feb. 11, 2022 RB letter) at p. 2, ¶ 4; Trial Ex. 32 (Comment Table dated Jan 24, 2022) at p.
 24 11, row “Receiving Water Monitoring Requirements.” Similarly, on November 3, 2022, the
 25 Regional Board again notified CDCR that the Prison violated Provision D of the Small MS4
 26 Permit. Trial Ex. 35 (Nov. 3, 2022 Letter) at p. 2. Again, on November 30, 2022, the Regional
 27 Board again notified CDCR of the receiving water exceedances and required compliance with the
 28 iterative process. Trial Ex. 36 (Nov. 30, 2022 letter) at p. 2, ¶ 2.

1 In addition, CDCR has also violated Provision D by failing to take corrective actions to
 2 address these RWL violations. Provision D requires a discharger follow a specific process when
 3 “MS4 discharges are causing or contributing to an exceedance of an applicable water quality
 4 standard . . .” Trial Ex. 2 (Small MS4 Permit) at p. 19, prov. D.1. The discharger must promptly
 5 notify and submit a report to the Regional Board identifying the BMPs that the discharger will
 6 implement to “prevent or reduce any pollutants that are causing or contributing to the
 7 exceedances of water quality standards.” *Id.* Once approved, the discharger must implement the
 8 required actions. *Id.* Failure to engage in this process is a violation of the RWL provisions.

9 In sum, the evidence will establish that CDCR has violated Provision D of the Small MS4
 10 Permit at least 72 times. CDCR has also independently violated Provision D of the Small MS4
 11 Permit every day since at least May 16, 2019 (the first RWL violation) by failing to follow the
 12 corrective action process required by the Small MS4 Permit.

13 C. Request for Judicial Notice

14 Plaintiffs seek to rely on two demonstratives not listed in Exhibit C, “Plaintiffs’ Exhibits”
 15 to the Final Pretrial Order:

- 16 1. California Code of Regulations, title 22, table 64449-A
- 17 2. Code of Federal Regulations, title 40, section 131.38, subsection (b)(1)

18 A court may take judicial notice of a pertinent law or regulation at any stage of the
 19 proceedings. Fed. R. Evid. 201; *Nat’l Agr. Chemicals Ass’n v. Rominger*, 500 F. Supp. 465, 472
 20 (E.D. Cal. 1980) (“I may, of course, take judicial notice of the California regulations.”). A court
 21 “must” take notice if a party requests it and supplies the court with the requisite information. Fed.
 22 R. Evid. 201(c).

23 The regulations are not listed in Plaintiffs’ exhibit list because they are intended to be used
 24 as a testimonial aid. The regulations are relevant to this action because they contain numeric
 25 values for various metals that are incorporated by reference into the Water Quality Control Plan
 26 (“Basin Plan”) for the Sacramento River basin and the San Joaquin River Basin. Trial Ex. 16
 27 (Basin Plan) §§ 3.1.3 (aluminum, iron, manganese), 4.2.1.1.15 (copper, lead, zinc). Because these
 28 values are incorporated by reference and are not set out in the Basin Plan, the regulations are

1 offered to aid testimony regarding those values.

2 The regulations are true and correct copies of the cited regulations, downloaded from
3 Westlaw in PDF format without modification.

4 **IV. REQUESTED REMEDY TO ADDRESS CDCR'S VIOLATION OF ITS SMALL**
5 **MS4 PERMIT AND THE ACT**

6 The evidence Plaintiffs will present at trial, including but not limited to the results of
7 CDCR's own monitoring reports, will conclusively establish that CDCR has violated and
8 continues to violate or threaten to violation Provisions B.2, B.3, C.1 and D of the Small MS4
9 Permit, and therefore has violated and continues to violate the Act. To address these violations,
10 Plaintiffs request that this Court: (1) issue injunctive relief to compel CDCR to comply with the
11 Act and specifically to take specific measures on a fixed timeline to do so, including, but not
12 limited to, implementing all of the recommendations in the Revised Storm Water Collection
13 System Investigation Finding Report submitted by CDCR to the Regional Board on November 1,
14 2019; and (2) awarding Plaintiffs their attorneys' fees and costs as required by the Act.

15 With regard to the details of the injunctive relief, the Court has ordered Plaintiffs to
16 prepare and submit a proposed form of judgment including the specific actions to be taken by
17 CDCR to comply with the Act and a schedule of performance, which Plaintiffs will do. With
18 regard to attorneys' fees and costs, Plaintiffs will fix those fees and costs through appropriate
19 post-trial motions.

V. CONCLUSION

Plaintiffs look forward to the opportunity to present the Court with their evidence of CDCR's multiple and ongoing violations of the Act. CDCR's continuing discharges of highly polluted water to Mule Creek must finally stop.

Dated: April 4, 2023

BEST BEST & KRIEGER LLP

By: /s/ Rebecca Andrews

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Dated: April 4, 2023

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1 California Sportfishing Protection Alliance v. Allison, et al.;
2 Amador v. Allison, et al.
3 United States District Court, Eastern District of California,
4 Case No. 20-cv-02482 WBS AC

5 **PROOF OF SERVICE**

6 I, Lisa Atwood, declare:

7 I am a citizen of the United States and employed in San Diego County, California.

8 I am over the age of eighteen years and not a party to the within-entitled action. My
9 business address is 655 West Broadway, 15th Floor, San Diego, California 92101. On
10 April 4, 2023, I served a copy of the within document(s):

11 JOINT TRIAL BRIEF OF PLAINTIFFS COUNTY OF AMADOR AND
12 CALIFORNIA SPORTFISHING PROTECTION ALLIANCE



14 **By Electronic Service.** Pursuant to CM/ECF System, registration as a
15 CM/ECF user constitutes consent to electronic service through the Court's
16 transmission facilities. The Court's CM/ECF system sends an e-mail
17 notification of the filing to the parties and counsel of record who are registered
18 with the Court's EC/ECF system.

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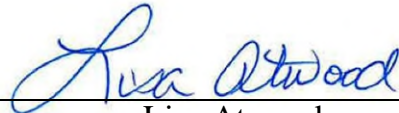
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I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

Executed on April 4, 2023, at San Diego, California.



Lisa Atwood